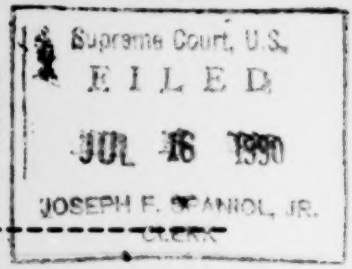
90-142



NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JAMES C. DUNKEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DONALD W. MacPHERSON
MacPHERSON & McCARVILLE
3404 W. Cheryl Drive
Suite A250
Phoenix, AZ 85051
(602) 866-9566
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. In a criminal tax case, must a defendant's understanding of the tax law be "objectively reasonable?" [The 7th Circuit says "yes," while the 2nd, 7th, 5th, 6th and 9th Circuits say "no;" this Court has granted certiorari on the identical issue in U.S. v. Cheek, 882 F.2d 1263 (7th Cir. 1989) cert granted 110 S.Ct. 1108 (1990).

2. In a criminal tax case, is the "ostrich instruction" inconsistent with the tax statutes which require knowledge and specific criminal intent, where the jury is instructed that it can infer knowledge from a combination of suspicion and indifference to the truth?

3. In a tax evasion case, is the indictment infirm on the basis of vagueness or duplicity where it fails to

distinguish between the two crimes of evasion of assessment and evasion of payment of the tax? [This Court and several circuits have repeatedly held that 26 U.S.C. Sec. 7201 encompasses two crimes.]

4. In a tax evasion case, where the Government is required to prove a tax deficiency stemming from an affirmative act, is it the obligation of the Government to prove the deficiency which results not from a failure to file (gross income), but from a specific affirmative act? [This Court has repeatedly held that the failure to file a return is not sufficient to support a charge of tax evasion because it does not constitute an affirmative act.]

5. In the wake of California v. Greenwood, 108 S.Ct. 1625 (1988), by which this Court held that a defendant does not have a reasonable expectation of

privacy in garbage left on the public sidewalk, does a defendant/business owner have such expectation in garbage left in a private dumpster, where the dumpster is on private property and within the curtilage of the business?

PARTIES

The parties to the proceedings below are Donald W. MacPherson; John G. McKenzie, Assistant U.S. Attorney, Rockford, Illinois; Lisa K. Osofsky and Howard M. Pearl, Assistant U.S. Attorneys, 219 S. Dearborn Street, Chicago, Illinois 60604.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	
OPINION OF THE COURT BELOW	2
JURISDICTIONAL STATMENT	2
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE FACTS	3
REASONS FOR GRANTING THE WRIT:	16
I. INTRODUCTION	16
II. REQUIRING A GOOD FAITH MISUNDERSTANDING OF THE LAW TO BE OBJECTIVELY REASONABLE TO NEGATE WILLFULNESS IN A TAX PROSECUTION CONFLICTS WITH THE DECISION OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS	19
A. The Seventh Circuit Requires That a Defendant's Belief Must be Objectively Reasonable to Qualify for a Mistaken View of Law.	19
B. The Requirement That a Mistake of Law Must be Objectively Reasonable to Negate Willfulness Conflicts With Decisions of This Court.	20

Page

C. The Seventh Circuit's Decision Conflicts With the Other Circuits, Which Conflict This Court Should Resolve. 24

III. DECISIONS OF THIS COURT PROHIBIT A JURY FROM INFERRING WILLFULNESS FROM A COMBINATION OF SUSPICION AND INDIFFERENCE TO THE TRUTH IN A CRIMINAL PROSECUTION. 28

IV. THE SEVENTH CIRCUIT'S DECISION THAT SEC. 7201 CREATES ONLY ONE CRIME - TAX EVASION - CONFLICTS WITH THE DECISIONS OF THIS COURT AND WITH OTHER CIRCUIT COURTS OF APPEALS 29

A. The Seventh Circuit Found That Sec. 7201 Creates Only One Crime: Tax Evasion 30

B. The Seventh Circuit's Decision That Sec. 7201 Creates Only One Crime Conflicts With the Decisions of this Court. 31

C. The Seventh Circuit's Decision Conflicts With the Other Circuits, a Conflict Which This Court Should Resolve. 33

Page

D. Evasion of the Assessment of Taxes as Opposed to the Evasion of payment of Taxes Requires Different Proof of Affirmative Acts. 35

V. LACK OF SUFFICIENT EVIDENCE ON THE EVASION COUNTS I AND IV DENIED PETITIONER HIS FIFTH AND SIXTH AMENDMENT RIGHTS 39

A. Overview 39

B. Income Tax Evasion Requires an Affirmative Act 39

C. DUNKEL'S Theory 40

D. The Government's Lack of Proof 41

E. DUNKEL'S Motion to Strike 42

F. Confusion to the Jury and Prejudice to DUNKEL 43

VI. IN THE WAKE OF CALIFORNIA v. GREENWOOD, 108 S.CT. 1625 (1988) BY WHICH THIS COURT HELD THAT A DEFENDANT DOES NOT HAVE A REASONBLE EXPECTATION OF PRIVACY IN GARBAGE LEFT ON THE PUBLIC SIDEWALK, A DEFENDANT - BUSINESS OWNER - DOES HAVE SUCH EXPECTATION IN GARBAGE LEFT IN A PRIVATE DUMPSTER, WHERE THE DUMPSTER IS ON PRIVATE PROPERTY

Page

AND WITHIN THE CURTILAGE OF THE BUSINESS 43

A. The Seventh Circuit Decision 44

B. The Greenwood Case 44

VII. IMPLICATIONS AND CONCLUSION 50

APPENDIX filed separately

TABLE OF CITATIONS

CASES	Page
Battjes v. United States, 172 F.2d 1, 4 (6th Cir. 1949)	26
Bollenbach v. United States, 326 U.S. 607	38
California v. Greenwood, 108 S.Ct. 1625 (1988)	43,44 46,47, 50
Cohan v. United States, 297 F.2d 760, 770 (9th Cir. 1962)	34,37
Cooley v. United States, 501 F.2d 1249, 1253 (9th Cir. 1974)	26
Florida v. Riley, 109 S.Ct. 693 (1989)	48,49
Long v. United States, 355 U.S. 339 (1958)	31,33 36
Mann v. United States, 319 F.2d 404, 409-410 (5th Cir. 1963)	25
Oliver v. United States, 104 S.Ct. 1735 (1984)	48

	Page
Sansone v. United States, 380 U.S. 343 (1965)	22,23, 30,31, 32,33, 34,40, 42
United States v. Aitken, 755 F.2d 188 (1st Cir. 1985)	24
United States v. Ashfield, 735 F.2d 101, 105 (3rd Cir. (1984)	24
United States v. Bahalik, 606 F.2d 99 (5th Cir. 1979)	47,48, 50
United States v. Bishop, 412 U.S. 346 (1973)	22,28
United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987)	20
United States v. Burton, 737 F.2d 439, 441 (5th Cir. 1984)	25
United States v. Cheek, 882 F.2d 1263 (7th Cir. 1989)	19
United States v. Dack, 747 F.2d 1172, 1174 (7th Cir. 1984)	31,33 34,
United States v. Dunkel, 900 F.2d 105 (7th Cir. 1990)	in passim

	Page
United States v. England, 347 F.2d 425 (7th Cir. 1965)	34
United States v. Flintcraft, 803 F.2d 184 (5th Cir. 1986)	25
United States v. Goetz, 746 F.2d 705 (11th Cir. 1984)	27
United States v. Hogan, 861 F.2d 312, 315 (1st Cir. 1988)	33,36
United States v. Jerde, 841 F.2d 818, 822 (8th Cir. 1988)	26
United States v. Krager, 711 F.2d 6, 7 (2nd Cir. 1983)	24
United States v. Masat, 896 F.2d 88 (5th Cir. 1990)	34
United States v. Michaels, 726 F.2d 1307 (8th Cir. 1984)	44,46
United States v. Mollet, 290 F.2d 273, 274 (2nd Cir. 1961)	33,37
United States v. Murdock, 290 U.S. 389 (1933)	20,21, 22,23, 29
United States v. Paine, 800 F.2d 227, 229 (10th Cir. 1986)	27

	Page
United States v. Phillips, 775 F.2d 262, 263 (10th Cir. 1985)	26
United States v. Pomponio, 429 U.S. 10 (1976)	23,28, 29
United States ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976)	50
United States v. Schiff, 801 F.2d 108, 112 (2nd Cir. 1986)	27
United States v. Spies, 63 S.Ct. Rpt. 364 (1943)	40,42
United States v. Swart, 679 F.2d 698 (7th Cir. 1982)	50
United States v. Terry, 702 F.2d 299 (7th Cir. 1983)	47,48, 50
United States v. Voohies, 658 F.2d 710 (9th Cir. 1981)	34,36
Yarborough v. United States, 230 F.2d 56, 61 (4th Cir. 1956)	25

STATUTES

18 U.S.C. Sec. 3231	3

	Page
26 U.S.C. Sec. 7201	3,4, 18,29, 30,31, 32,33, 50,51
26 U.S.C. Sec. 7203	3
28 U.S.C. Sec. 1254(1)	2
Rule 13. Supreme Court Rules	2

U.S. CONSTITUTION

Fourth Amendment	2,48, 49,50
Fifth Amendment	3,21, 29,30, 39,51
Sixth Amendment	3,29, 30,39, 51,52

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES C. DUNKEL, PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The PETITIONER, JAMES C. DUNKEL (DUNKEL), by and through counsel DONALD W. MacPHERSON of the law firm MacPHERSON & McCARVILLE, P.A., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on April 16, 1990. (The mandate

was stayed by this Court on May 25, 1990; See APPENDIX E.)

OPINIONS BELOW

The opinion of the Appellate Judges is reprinted in APPENDIX A to this Petition and reported as United States v. Dunkel, 900 F.2d 105 (7th Cir. 1990).

JURISDICTION

The opinion of the Court of Appeals was filed on April 16, 1990. A timely filed petition for rehearing and suggestion for rehearing en banc was denied on May 11, 1990, Appendix B. The jurisdiction of this court rests upon 28 U.S.C. Sec. 1254(1). The Petition is timely filed pursuant to Rule 13 of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

This case involves the Fourth Amendment, the due process clause of the

Fifth Amendment, and the Sixth Amendment to the United States Constitution, 26 U.S.C. Secs. 7201 and 7203, which collectively constitute APPENDIX C.

STATEMENT OF THE FACTS

DUNKEL was convicted in the United States District Court, Northern District of Illinois on a five-count indictment charging him with willfully and knowingly failing to make a federal income tax return for the calendar years 1981, 1982 and 1983, in violation of 26 U.S.C. Sec. 7203; and willfully attempting to evade and defeat the substantial federal income tax due and owing for the years 1981 and 1983, in violation of 26 U.S.C. Sec. 7201. The District Court had original jurisdiction under 18 U.S.C. Sec. 3231. APPENDIX C-11a.

Count I of the Indictment (attempted tax evasion) alleges that:

> ... James C. Dunkel ... did willfully and knowingly attempt to evade and defeat the substantial income tax due and owing to the United States of America for the 1981 calendar year: [attempted evasion of assessment or of collection? two different crimes]
> (a) by failing to make said income tax return on or before April 15, 1982 to the Internal Revenue Service ... [a failure to act; not an affirmative act]
> (b) by using checks made payable to the Defendant in which constituted income, endorsing the checks and giving the checks to others in payment for expenses in order to conceal his income; [affirmative act]
> (c) by requesting and receiving rent payments in the form of silver dollars instead of Federal Reserve Notes, the silver dollars having a face value of approximately $297 [affirmative act];
> (d) by ceasing and failing to pay estimated tax payments; [a failure to act; not an affirmative act]; and
> (e) by depositing and cashing checks at out of state banks [affirmative act]; in violation of Title 26, United States Code, Sec. 7201. (Emphasis added)

In Count IV of the Indictment (attempted tax evasion), alleges that:

> ... JAMES C. DUNKEL, Defendant

> herein, did willfully and knowingly attempt to evade and defeat the substantial income tax due and owing to the United States of America for the 1983 calendar year:
> (a) by failing to make said income tax return on or before April 15, 1984 to the Internal Revenue Service .... [failure to act; not an affirmative act];
> (b) by using checks made payable to the Defendant which constituted income, endorsing the checks and giving the checks to others in payment for expenses in order to conceal his income [affirmative act]; and
> (c) by failing to pay estimated tax [failure to act; not an affirmative act]; in violation of Title 26, United States Code, Sec. 7201.[1]

Taken as a whole, the Indictment could be read to mean that DUNKEL was charged with attempt to evade the payment of tax. On the other hand, given the fact that some of the affirmative acts could be read to express an attempt of

---

1. References to the record (pg. B1) Indictment, taken from APPELLANT'S Appendix in the Court of Appeals.

concealing income, the Indictment could be read to mean that DUNKEL attempted to evade the assessment of tax. Perplexed by the charges, DUNKEL filed pretrial motions to dismiss the Indictment due to duplicity or vagueness, or in the alternative to require an election and also move for a bill of particulars. These motions were denied and the case proceeded to trial.

At his jury trial, PETITIONER presented evidence of his sincerely held views that he did not believe he had violated the law; i.e. that his conduct was not "willful". Further, PETITIONER presented evidence on Counts I and IV that the GOVERNMENT did not prove the amount of tax (the deficiency) DUNKEL attempted to evade by the "affirmative acts": depositing checks in an out-of-state bank for 1981, receiving

silver for 1981, or using third-party checks for 1981 and 1983.

It was and is DUNKEL'S position that because he had failed to file a timely return, and because he was charged with tax evasion which requires a tax deficiency stemming from an affirmative act, it was the obligation of the GOVERNMENT to prove a tax due and owing resulting from not the failure to file, but from the affirmative act. The GOVERNMENT failed in this obligation, as evidence by the following exchange (emphasis supplied);

By MR. MACPHERSON, (Defense Counsel):

Q. Sir [IRS Revenue Agent/Expert Witness], for the year 1983 and what's in evidence as to third-party checks [affirmative act] that the DEFENDANT endorsed over for expenses, have you made any calculation as to what tax would be due and owing for 1983 from that income reflected on those checks that were signed over for expenses ...

A. No, I did not.

Q. And as to 1981, same question. Did you make any independent calculation as to what tax would be due in owing just from income reflected on the third-party check? [affirmative act]

A. No, I did not....

Q. And for 1981, did you make any independent calculation as to what tax would be due and owing from any income that would be reflected on depositing in cash and checks at an out-of-state bank? [affirmative act]

A. No, I did not....

Q. Sir, considering that you've done it on all of the income, I take it then, you wouldn't be able to tell the jury what amount of tax the DEFENDANT attempted to evade by depositing the checks in an out-of-state bank for 1981, using third-party checks for 1981, or receiving silver for 1981? [affirmative act]

A. I wouldn't be able to tell you about the tax for any specific item, no.

Q. And that would be the same as to 1983?

A. That's correct.

(APPENDIX D-1 pgs. 28a-30a.)

Before closing arguments, the District Court held a jury instruction

conference. Over PETITIONER'S objection, the Court decided to give the GOVERNMENT'S instructions number 32, 37, and 75 as follows: (APPENDIX D pgs. 15a-21a; 25a-27a)) as follows:

> To sustain the charges of attempting to evade or defeat a tax as charged in Count I (tax year 1981) and Count IV (tax year 1983) of the indictment, the government must prove the following propositions:
>
> First, a substantial tax was due and owing by the Defendant;
>
> Second, the Defendant intended to evade or defeat the tax; and
>
> Third, the Defendant willfully did some act in furtherance of this intent .... (Emphasis added)
>
> The evidence need not prove each affirmative act alleged... However, to sustain the charge of willfully attempting to evade taxes the government must show more than a failing by the defendant to make an income tax return.... An affirmative act of the defendant is an act the likely of which would be to mislead or conceal....

(APPENDIX D-2, pg. 31a-32a.)

The GOVERNMENT'S counsel asserted that these instructions were accurate in that there was no need to distinguish between whether the PETITIONER intended to evade or defeat the assessment of tax or evade or defeat the payment of tax, because PETITIONER was charged with "evading the tax." (APPENDIX D pgs. 13a, 19a, 20a) Instruction 37 informed the jury that willfulness could be shown if there was a specific intent to evade or defeat a tax which was the PETITIONER'S legal duty to pay and which the PETITIONER knew it was his legal duty to pay. (APPENDIX D-2 pg. 32a)

> With respect to the charges of tax evasion contained in Count I (1981) and Count IV (1983), the term "willfully" means voluntary and intentionally with a specific intent to evade or defeat a tax which it was the legal duty of the Defendant to pay to the government and which the Defendant knew it was his legal duty to pay. (Emphasis added)

This was the law of a case which was argued by the parties and which was submitted to the jury over PETITIONER'S objections, even after it was agreed by the parties that there was no evidence to show any intent to evade or defeat the payment of any tax. (APPENDIX D pgs. 17a, 18a)

Two other instructions on willfulness were discussed. The first was a definition of "objectively reasonable good faith misunderstanding" which was originally tendered as Government Instruction 40 (APPENDIX D pg. 24a) after redrafting by the Court was given, over PETITIONER'S objection, as follows:

> A good faith misunderstanding of the law may negate willfulness. In order for a good faith misunderstanding of the law to negate willfulness, <u>the misunderstanding must be objectively reasonable</u>....
> (Emphasis added)

(APPENDIX D-2 pgs. 32a-33a) With this instruction the court also gave the following "Ostrich" instruction 39 (emphasis supplied):

> The word knowingly means that the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct and by all the facts and circumstances surrounding the case.
>
> You may infer knowledge from a combination of suspicion and indifference to the truth. If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his eyes for fear of what he would learn, you may conclude that he acted knowingly as I have used the word.
>
> (APPENDIX D-2 pg. 32a)

PETITIONER'S objection to THIS instruction was also denied by the court. (APPENDIX D pg. 21a-23a)

Some of the evidence used to convict

DUNKEL came from his refuse, which an informant culled. During an evidentiary hearing, PETITIONER testified that he had purchased a dumpster for the purpose of disposing medical waste and other toxic matters. The dumpster was located in a private parking lot (dental and other offices), and within the curtilage of PETITIONER's office. (RT pg. 176)[2] Local ordinances required that arrangements be made with a private company to have collectors come in and pick up the trash. Local ordinances made it unlawful for PETITIONER to use anything other than the dumpster for collection of his garbage (Rockford Ordinance, Sections 13-25, 13-26, 13-29); and, also for persons to "move, remove or intefere with any waste

---

2. All references are to the Transcript of Proceedings, Vol 2, Jan. 30, 1989/Motion to Suppress on file with the Court of Appeals.

matter receptacle or the contents thereof." (Sec. 13-23) (See APPENDIX F, pgs. 36a, 37a) (RT pg. 176-178)

The dumpster was located on commercial property owned by PETITIONER, upon which he had erected a six-foot fence between the building and the adjacent parking lot. (RT 179, 180) The property was also posted with "private property/no trespassing" signs. (RT 184, 185) DUNKEL also testified that he had no intention of abandoning the property that went into the dumpster, to wit:

> It's always been my feeling that that's a secured area because I will throw away cartridges of anesthetics and things that are out of date, medication that would fall into anybody's hands could be fatal.

(RT 186) Further testimony showed that it would be impossible for somebody on the north side of the property to reach over and attempt to get trash out of the

dumpster because the retaining wall is eleven feet, ten inches away from the dumpster. (RT 198, 199) The dumpster used on the premises was four feet by seven feet and also had a metal lid on it to keep the neighborhood children and animals out. (RT 178, 179)

The District Court found that (1) the dumpster was 170 feet away from the street and (2) on a private parking lot. (RT 299-309) However, because the dumpster was located on a parking lot where the public was invited, at least insofar as conducting business and the eight tenants located therein, the area was accessible to the general public. Thus, the District Court held PETITIONER had no reasonable expectation of privacy in his garbage. As to whether DUNKEL'S subjective expectation of privacy was objectively reasonable, the Court found

such an issue to be compounded because of DUNKEL'S profession and his need to have privacy in the trash deposited. Nevertheless, the District Court denied DUNKEL'S suppression motion. (RT 311, 312)

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

PETITIONER JAMES DUNKEL was convicted of specific intent crimes under jury instructions which required him to show that his beliefs about his legal duties were not only sincerely and honestly held, but also "objectively reasonable." The instruction also told the jury that they could infer knowledge from a combination of suspicion and indifference to the truth; i.e., that the nature of the PETITIONER'S conduct was not through ignorance, mistake or accident, but rather capricious or

careless.

The Seventh Circuit, in its unique "objectively reasonable" test, is in direct conflict with at least seven other circuits, all of which espouse a subjective standard which allows a jury to determine a defendant's good faith vel non based on what the defendant honestly believed, and not what a jury believes is reasonable. This Court's Rule 10 sets out as a reason for granting certiorari, a situation where a court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. Such is clearly the situation here. Rule 10 also asks whether a court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way that conflicts

with the applicable decisions of this Court. Both criteria here apply.

The Seventh Circuit not only has departed from the prevailing law in the seven other federal circuits on the element of willfulness, but also has chosen to ignore the holdings of this Court and other federal circuits which have interpreted and applied Sec. 7201; i.e. Sec. 7201 creates two crimes: evasion of assessment and evasion of payment. Moreover, the District Court's instruction permits a jury to infer willfulness from a combination of suspicion and indifference to truth and is contrary to the decisions of this Court, thereby reducing willfulness in the context of a criminal tax case to a level of "gross negligence."

The Seventh Circuit's contrary approach here has broad implications for

the administration of the criminal tax laws. Only this Court can act to bring the Seventh Circuit into conformity with other circuits and with this Court's own decisions.

II. REQUIRING A GOOD FAITH MISUNDERSTANDING OF THE LAW TO BE OBJECTIVELY REASONABLE TO NEGATE WILLFULNESS IN A TAX PROSECUTION CONFLICTS WITH THE DECISION OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS

A. The Seventh Circuit Requires That a Defendant's Belief Must be objectively Reasonable to Qualify for a Mistaken View of Law.

The Seventh Circuit held that PETITIONER'S belief must be objectively reasonable in order to constitute a mistaken view of law and thereby negate willfulness:

> Although only willful evasion or failure to file is criminal in this circuit, a mistaken view of law does not negate willfulness if the defendant's legal belief is objectively unreasonable; e.g. United States v. Cheek, 882 F.2d 1263 (7th Cir. 1989) cert granted

> 110 S.Ct. 1108 (1990). Like the Lord High Executioner in the Mikado, we've "got a little list" of beliefs that are objectively unreasonable such as the Sixteenth Amendment was not properly ratified and that wages are not income. See United States v. Buckner, 830 F.2d 102, 103 (7th Cir. 1987). We add to that list the belief that payment of income taxes is "voluntary." Juries should not be invited to decide for themselves whether it is "reasonable" to believe that the income tax law is voluntary ... A goodly part of the business of district courts is creating object lessons of that fact. Dr. Dunkel has become another.

B. The Requirement That a Mistake of Law Must be objectively Reasonable to Negate Willfulness Conflicts With Decisions of This Court.

This Court has consistently held that criminal tax offenses are specific intent crimes, and a defendant who merey fails to measure up to some prescribed standard of conduct is not a criminal.

In United States v. Murdock, 290 U.S. 389 (1933), defendant asserted his

Fifth Amendment privilege against self incrimination in response to questions put to him by a revenue agent of the Internal Revenue Service. Thereafter, he was charged with willful failure to provide information. The trial court refused to instruct the jury that the defendant's good faith belief in the propriety of his Fifth Amendment assertion would constitute a defense to the crime charged. This Court in Murdock held:

> Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. (Emphasis added)

Murdock was entitled to the instruction he had requested, even though his refusal to answer questions put to

him by the revenue agent was intentional and without legal justification. Id. at 396-397.

Likewise, Sansone v. United States, 380 U.S. 343 (1965), held that the defendant's conduct was willful only if "he knew he should have reported more income than he did." Id. at 353. Defendant was under the mistaken belief that because repairs needed to be done on land which was sold, such repairs eliminated any gain, and therefore, he had no income. Neither Murdock nor Sansone suggest that a defendant's belief must be "objectively reasonable."

In United States v. Bishop, 412 U.S. 346 (1973), this court disagreed that willfulness would suffice for a conviction of a tax related offense upon a showing of "unreasonable, capricious or careless disregard for the truth." The

court noted that: "In our complex tax system, uncertainty often arises, even among taxpayers who earnestly wish to follow the law." Id. at 360. This Court reaffirmed what is said in Sansone and Murdock:

> The court in fact has recognized that the word willfully in these statutes generally connotates [sic] a voluntary intentional violation of a known legal duty. It has formulated the requirement of willfulness as bad faith or evil intent... or evil motive and one of justification in view of all the financial circumstances of the taxpayer.

Id. at 360.

In United States v. Pomponio, 429 U.S. 10 (1976), in a per curiam opinion, this court again noted that willfulness in the tax context requires more than a careless disregard for the truth. Id. at 12. The Pomponio court concluded that, "evil motive" means specific intent to violate the law. As to the meaning of

willfulness, the court stated: "A voluntary, intentional violation of a known legal duty." Id. at 12.

C. The Seventh Circuit's Decision Conflicts With the Other Circuits, Which Conflict This Court Should Resolve.

Alone among the circuits is the Seventh Circuit which, unlike any other circuit, requires a mistake of law to be objectively reasonable to negate willfulness. All other circuits have rejected such a rule without any difficulty, even as to "tax protesters." United States v. Aitken, 755 F.2d 188 (1st Cir. 1985) (mistake of law need not be objectively reasonable, the key is whether the defendant honestly held a mistaken belief as to what the law requires); United States v. Krager, 711 F.2d 6, 7 (2nd Cir. 1983); United States v. Ashfield, 735 F.2d 101, 105 (3rd Cir.

1984) cert denied 469 U.S. 858 (1984); Yarborough v. United States, 230 F.2d 56, 61 (4th Cir. 1956) cert denied 351 U.S. 969 (1956) ("ignorance of the law is no defense to crime except that where willfulness is an element of the crime, ignorance of a duty imposed by law may negate willfulness and failure to perform the duty"); Mann v. United States, 319 F.2d 404, 409-410 (5th Cir. 1963) cert denied 375 U.S. 986 (1964) (plain error to instruct the jury "to speculate as to what any other person ... would reasonably have expected to be the consequences of his conduct"); United States v. Burton, 737 F.2d 439, 441 (5th Cir. 1984) (a taxpayer's claimed belief that wages are not income need not be objectively reasonable to constitute a defense); United States v. Flintcraft, 803 F.2d 184 (5th Cir. 1986) after remand

863 F.2d 342 (5th Cir. 1988) (plain error to give an "objectively reasonable" instruction in a tax protester case); Battjes v. United States, 172 F.2d 1, 4 (6th Cir. 1949); United States v. Jerde, 841 F.2d 818, 822 (8th Cir. 1988) ("we agree that a subjective rather than an objective standard is to be applied in evaluating a good faith defense [to tax charges]"); (Cooley v. United States, 501 F.2d 1249, 1253 (9th Cir. 1974) cert denied 419 U.S. 1123 (1975) (if a person acts without reasonable ground for belief that his conduct is lawful, it is for the jury to decide whether he acted in good faith or whether he willfully intended to fail to file a return"); United States v. Phillips, 775 F.2d 262, 263 (10th Cir. 1985) ("we find that a subjective standard is appropriately applied in assessing a defendant's claimed belief

that the law did not require that he file a return"); United States v. Paine, 800 F.2d 227, 229 (10th Cir. 1986) (the jury was told "... even if a defendant's claim of good faith misunderstanding is unreasonable, the jury may nonetheless still find that the defendant acted in good faith and did not willfully intend to violate the law"); United States v. Goetz, 746 F.2d 705 (11th Cir. 1984) (it is the providence of the jury, not the court, to decide defendant's good faith). But see United States v. Schiff, 801 F.2d 108, 112 (2nd Cir. 1986) cert denied 480 U.S. 947 (1987) (dictum: an objectively reasonable instruction "would not have been error")

This Court should grant the Petition and resolve the conflict which now exists between the Seventh Circuit and the several circuit courts and the

disagreement and departure from this Court's decisions.

III. DECISIONS OF THIS COURT PROHIBIT A JURY FROM INFERRING WILLFULNESS FROM A COMBINATION OF SUSPICION AND INDIFFERENCE TO THE TRUTH IN A CRIMINAL TAX PROSECUTION - THE "OSTRICH INSTRUCTION".

As expressly noted by this Court in Pomponio, willfulness in the tax context requires more than a careless disregard for the truth. Id. at 12. As in Pomponio, in Bishop, supra, this court rejected any notion that willfulness could be shown by an "unreasonable, capricious, or careless disregard for the truth." The court rejected the Ninth Circuit's formulation of a lesser willfulness threshold, stating: "degrees of negligence give rise in the tax system to civil penalties." Id. at 361. An instruction which allows a jury to infer knowledge from a combination of suspicion

and indifference to truth reduces willfulness in the context of a criminal tax case to a level of "gross negligence."

Under Murdock and Pomponio, a defendant who has a bona fide misunderstanding of his duty to file does not "know" of his legal duty, because of his misunderstanding and lacks willfulness. A "conscious avoidance" or "Ostrich" instruction reduces willfulness in the context of a criminal tax case to a level involving a "careless disregard or reckless indifference to the truth," contrary to Bishop and Pomponio.

This Court should grant the Petition to determine whether the instruction is consistent with the statutes under which the PETITIONER was convicted and his Fifth and Sixth Amendment rights.

IV. THE SEVENTH CIRCUIT'S DECISION THAT SEC. 7201 CREATES ONLY ONE CRIME -

TAX EVASION - CONFLICTS WITH THE DECISIONS OF THIS COURT AND WITH OTHER CIRCUIT COURTS OF APPEALS

A. The Seventh Circuit Found That Sec. 7201 Creates Only One Crime: Tax Evasion

On appeal, DUNKEL argued that each count of the Indictment under Sec. 7201 is vague or alternatively duplicitous because it is not clear whether both the evasion of assessment of taxes and the evasion of payment of taxes were charged in each count. Thus, the Indictment violated his due process right within the Fifth Amendment and also his Sixth Amendment right in that a general verdict of guilty would not reveal whether the jury found him guilty of one crime and not guilty of the other or guilty at all. The Seventh Circuit, however, found that Sec. 7201 creates only one crime: tax evasion. In doing so, it rejected this court's decision in Sansone stating:

> Sometimes it is convenient to say that different methods are different (crimes) as the Supreme Court once said about Sec. 7201. Sansone v. United States, 380 U.S. 343, 354 (1965); See also United States v. Dack, 747 F.2d 1172, 1174 (7th Cir. 1984)...
>
> We need not decide whether Congress has authorized this. It is enough to say that nothing in the text or history of Sec. 7201 requires an indictment to treat Sec. 7201 as if it were two sections of the United States Code. APPENDIX "A" p. 4a, 5a.

B. The Seventh Circuit's Decision That Sec. 7201 Creates Only One Crime Conflicts With the Decisions of this Court.

The Seventh Circuit's decision that Sec. 7201 creates only one crime is totally inconsistent from this Court's decisions that Sec. 7201 charges not one, but two crimes.

In Long v. United States, 355 U.S. 339 (1958), defendants were charged in a multi-count indictment charging inter alia attempted evasion of assessment of

income taxes by filing a fraudulent return (Count VI) and with attempted evasion of payment of income taxes by converting and diverting assets (Count IX). Id. at 360, 361. This Court specifically found that the means of evading assessment of tax were different than the means of evading payment of tax. Id. at 343.

In Sansone v. United States, 380 U.S. 343 (1965), defendant was charged with attempting to evade taxes by defeating the assessment of taxes for the tax year 1957. Id. at 354. This Court again specifically recognized that Sec. 7201 includes separate and distinct offenses of willfully attempting to evade or defeat the assessment of a tax and willfully attempting to evade or defeat the payment of tax:

> As this Court has recognized, Sec. 7201 includes the offense of

> willfully attempting to evade or defeat the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of tax (Emphasis added).

Id. at 354, citing L , supra.

C. The Seventh Circuit's Decision Conflicts With the Other Circuits, a Conflict Which This Court Should Resolve.

The Panel's opinion conflicts with the First, Second, Seventh and Ninth Circuits which have expressly held that Sec. 7201 creates the two offenses, evading and defeating the assessment of tax and evading and defeating its payment. United States v. Hogan, 861 F.2d 312, 315 (1st Cir. 1988) (the court relied on Sansone and Dack and found that Sec. 7201 defines two separate and distinct crimes); United States v. Mollet, 290 F.2d 273, 274 (2nd Cir. 1961) (7201 prohibits both a willful attempt to evade any tax and a willful attempt to

evade the payment thereof). Cohan v. United States, 297 F.2d 760, 770 (9th Cir. 1962) (the two offenses are not the same); United States v. Voorhies, 658 F.2d 710 (9th Cir. 1981) (two crimes).

Aside from conflicting with other circuits, the Dunkel opinion conflicts with prior Seventh Circuit opinions. United States v. England, 347 F.2d 425 (7th Cir. 1965); United States v. Dack, supra (willful attempt to evade or defeat a tax includes government's efforts to ascertain a citizen's tax liability as opposed to willful attempt to evade or defeat payment of tax, citing Sansone and Voorhies).

The Fifth Circuit, however, has agreed with the Seventh Circuit opinion that there is one crime, the evasion of taxes. United States v. Masat, 896 F.2d 88, 91 (5th Cir. 1990) (under plain error

standard).

This Court should grant the Petition and resolve the conflict among the circuit courts regarding this important issue of law, an issue which will continue to arise.

D. Evasion of the Assessment of Taxes as Opposed to the Evasion of payment of Taxes Requires Different Proof of Affirmative Acts.

The Seventh Circuit's opinion recognized that PETITIONER'S Indictment listed six specific ways in which he evaded taxes (five in 1981 and three in 1982, with two methods used in each year), thereby drawing the conclusion that DUNKEL "knew exactly what he had to prepare to defend against, and the jury knew its role as well." APPENDIX "A", p. 5a.

Without any definitive identification of evidence to show which

of the affirmative acts supported the offense of evasion of assessment of taxes or evasion of payment of taxes for either year, 1981 or 1983, the Dunkel opinion overlooks the fact that the behavior indicative of an attempt to evade the payment of a tax does not necessarily meet the same standard as an attempt to evade the assessment of tax. This Court in Long, supra, noted that the means of evading assessment of tax were different than the means of evading payment of tax. Id. at 343. See also United States v. Voorheis, supra (evidence was sufficient to support the willfulness requirement for evasion of payment of taxes; Voorhies had engaged in affirmative acts indicative of an attempt to evade the payment of taxes); United States v. Hogan, supra (the affirmative act of filing a W-4 resulting in the under

withholding of tax indicative of an attempt to evade the payment of tax); United States v. Mollet, supra (the evidence adduced by the government goes beyond a mere failure by the defendant to reveal the existence of assets and is sufficient to satisfy the requisite affirmative conduct upon which the prosecution relies to show evasion of payment); Cohan v. United States, supra (affirmative act to evade or defeat the assessment of tax are distinct from the acts used to evade the payment of tax).

It is a fundamental precept of the administration of justice in the federal courts that the PETITIONER must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the

PETITIONER be guilty; our system demands that he be found guilty in the right way. Accordingly, it is no answer to the application of an erroneous view of law to suggest that the evidence is sufficient to support a unanimous verdict on both crimes, and that the verdict was reached in accordance with the proper standard of law. As this Court stated in a case in response to such a contention:

> It may not be amiss to remind that the question is not whether guilt be spelled out of a record but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal courts.

Bollenback v. United States, 326 U.S. 607, 614-615. PETITIONER is entitled to be tried under proper legal criteria and conviction should not be erroneously secured on one theory, on the speculation that conviction would have followed if

the correct theory had been applied. Such an application of the statute seriously undermines DUNKEL'S Fifth and Sixth Amendment rights.

V. LACK OF SUFFICIENT EVIDENCE ON THE EVASION COUNTS I AND IV DENIED PETITIONER HIS FIFTH AND SIXTH AMENDMENT RIGHTS

A. Overview

DUNKEL presents an issue never addressed in any reported tax case: whether the government can sustain a conviction for attempted income tax evasion where the government has not calculated the tax due and owing resulting from the affirmative act or acts constituting in the attempt; rather the government has calculated a tax resulting from a combination of DUNKEL'S failures to act, together with his affirmative acts.

B. Income Tax Evasion Requires An Affirmative Act

Long ago, put to rest a notion that a defendant could be charged with willful attempt of tax evasion by his mere failure to act. U.S. vs. Spies, 63 S.Ct. 364 (1943). In Sansone vs. U.S., 85 S.Ct. 1004 (1965), this court characterized the Spies decision as requiring in the felony tax evasion case "some willful commission in addition to the willful omissions that make up the list of misdemeanors."

C. DUNKEL'S Theory

Given the Spies holding as endorsed by Sansone, DUNKEL takes the issue one step further to causation. If failure to file a return or failure to pay the tax (or failure to keep adequate records) is not sufficient as an affirmative act which would constitute an attempt, then any tax evaded or avoided as a result of said failures would not be tax which

DUNKEL "attempted to evade." No affirmative act, no attempt; no attempt, no "attempted tax evasion."

D. The Government's Lack Of Proof

Internal Revenue Service AGENT KELLEY KILCOIN was called to the stand to calculate the tax liability of DUNKEL for the years in question. KILCOIN was called back to the stand by the defense and asked whether he made any tax liability calculation as to the income directly attributable to the attempts to evade alleged in the indictment. He answered that he did not make any such calculation. KILCOIN also testified that he would not be able to tell the jury what amount of tax the DUNKEL attempted to evade in 1981 by DUNKEL depositing checks in an out of state bank using third party checks and receiving silver. KILCOIN also said that his answer would

be the same as to 1983.

In the government's case in chief KILCOIN had testified that DUNKEL had, for example, a tax liability of some $41,000.00 for 1981, which tax calculation was based upon all unreported income; i.e.. income reported as a result of DUNKEL'S failure to file (lack of attempt) and DUNKEL'S alleged affirmative acts in his attempt to evade the tax: third party checks, silver coins and an out of town bank account. (The amount for 1983 was about $14,000.00 due.)

E. DUNKEL'S Motion to Strike

Relying upon Spies and Sansone, DUNKEL in a pretrial motion moved to strike from the indictment DUNKEL'S failure to file a return and failure to pay estimated tax payments which were listed under the heading of "Attempt to Evade and Defeat the Substantial Income

Tax Due and Owing." The motion was denied. DUNKEL renewed his motion during the instruction conference. APPENDIX D, 26A.

F. Confusion to the Jury and Prejudice to DUNKEL.

The confusion of the jury and prejudice to PETITIONER should be obvious: the higher the amount of tax DUNKEL attempted to evade, the more culpable PETITIONER may appear. If, the deficiency as a matter of law is to be computed from the "affirmative acts," as PETITIONER argues it should, PETITIONER has not been tried under the proper legal criteria and his conviction has been erroneously secured. Accordingly, the writ should issue.

VI. IN THE WAKE OF CALIFORNIA V. GREENWOOD, 108 S.CT. 1625 (1988) BY WHICH THIS COURT HELD THAT A DEFENDANT DOES NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN GARBAGE LEFT ON THE PUBLIC SIDEWALK, A DEFENDANT - BUSINESS OWNER - DOES

HAVE SUCH EXPECTATION IN GARBAGE LEFT IN A PRIVATE DUMPSTER, WHERE THE DUMPSTER IS ON PRIVATE PROPERTY AND WITHIN THE CURTILAGE OF THE BUSINESS.

A. The Seventh Circuit Decision

In affirming the District Court's decision that DUNKEL had no reasonable expectation of privacy, "curtilage" did not alter the fact; "... the parking lot was open to all comers... not only DUNKEL'S invitees, but also those of his seven tenants." APPENDIX A, pg. 3a. The Court found the dumpster to be accessible to the public "as much as if it were sitting in any other open lot." APPENDIX A, pg. 4a. The panel relied on the case United States v. Michaels, 726 F.2d 1307, 1312-13 (8th Cir. 1984), cited in Greenwood, 46 U.S. at 42.

B. The Greenwood Case

The cases cited in California v. Greenwood are distinguishable from the

instant case in that the garbage seized in all those cases was no longer on private property and was outside the curtilage. Therefore, in those cases, there as no reasonable expectation of privacy. Unlike the case of Greenwood and the cases cited therein, the facts in the instant case do not support the Government's claim that PETITIONER extended an implicit invitation to individuals to enter during the non-business hours or when there were no employees on the premises. Further, there is no reasonable basis to believe that the dumpster was generally open to the public, i.e., in a manner of speaking for the express purpose of having strangers take it.

First, the dumpster was well within the curtilage of the business and not for public consumption or use. Second, signs

were posted which informed people that the property was private and there was no trespassing. Third, the dumpster was placed specifically on the property by the doctor because of the medical waste and toxic matters which had to be disposed of. Also, the property had been partially fenced in and a retaining wall built by the doctor to keep out uninvited individuals.

Relying on United States v. Michaels, cited by this Court in Greenwood, is distinguishable. Michaels involved a trash bin accessible to all apartment tenants, invited and uninvited visitors, unfenced and unrestricted in its use. In the instant case, the evidence indicates an intent by DUNKEL to retain some control over or interest in the discarded trash; i.e. medical waste. In addition, local ordinances required

PETITIONER to use a dumpster for collection of his garbage, required a private collection to pick up the dumpster and collect the contents thereof, and also made it a crime for any person to remove or interfere with the receptacle or contents thereof. See United States v. Terry, 702 F.2d 299 (7th Cir. 1983) (restrictions on containers or retention of containers on private property until collected, indicate an intent to retain a private interest in the trash discarded); and United States v. Bahalik, 606 F.2d 99 (5th Cir. 1979) (reliance on local ordinances would indicate an expectation of privacy) also cited in Greenwood.

DUNKEL'S subjective belief that he had an expectation of privacy in the refuse discarded would not be unreasonable in light of his intent to

retain a privacy interest in the trash discarded. The panel's finding that the "dumpster was accessible to the public as much as if it were sitting in any other open lot," overlooks the cases of Terry and Bahalik, supra, and DUNKEL'S subjective intent to retain control over the trash. The panel's decision also overlooks this Court's decisions in Oliver v. United States, 104 S.Ct. (1735) (1984) and Florida v. Riley, 109 S.Ct. 693 (1989).

In the case of Oliver, this Court noted that, "No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of governmental intrusion not authorized by warrant," and spoke of "societal understanding" and "societal expectations of privacy." In doing so, this Court noted a difference

between accessibility of the public to open fields as compared to homes, offices, and commercial properties. Id. at 1744. Unlike Oliver, the search here occurred on commercial property and not in an open field.

In the case of Riley, this Court found it to be of obvious importance, that the Florida Police who utilized a helicopter to survey a greenhouse in a residential backyard in which defendant was growing marijuana was not violating the law because of the specific altitude at which it had been flying. See Riley at 697. Unlike Riley, the government's informant in this case violated the law which prohibited anyone from rescuing garbage from the dumpster was violated.

The panel's decision has decided an important question of federal law in a vacuum that now conflicts with the Fourth

Amendment protection to commercial premises and the curtilage thereof. See U.S. Swart, 679 F.2d 698 (7th Cir. 1982); c.f. U.S. ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976) (location of area searched outside the curtilage not protected by the Fourth Amendment), as well as the cases of Bahalik and Terry, cited in Greenwood. Accordingly, cert should be granted.

VII. IMPLICATIONS AND CONCLUSION

The Tax Code is a law of truly national application, affecting every citizen in the country. Yet, the Seventh Circuit decision, if not reversed, will result in an uneven application of that law. Henceforth, in the Seventh Circuit (and the Fifth Circuit), the GOVERNMENT need not elect the offense under Sec. 7201, evasion of payment or evasion of assessment. Rather, the GOVERNMENT will

be allowed to prosecute other defendants, as they did the PETITIONER, under a duplicitous and/or ambiguous indictment, i.e. "evading the tax". In other circuits, however, a defendant who is charged under Sec. 7201 will be entitled to know prior to trial whether he is charged with the crime of evading assessment of taxes or evading the payment of taxes. Further, a defendant will know well in advance whether the affirmative acts relied on and the evidence adduced by the GOVERNMENT is sufficient to justify a conviction under Sec. 7201. The uneven interpretation and application of the law is inappropriate and has denied the PETITIONER (and will deny others in the Seventh and Fifth Circuits) their Fifth and Sixth Amendment rights. The Seventh Circuit's requirement that a mistaken view of law

must be objectively reasonable to negate willfulness, and an instruction which allows a jury to conclude that PETITIONER acted willfully from a combination of suspicion and indifference to the truth, conflicts with the decisions of this Court and is inconsistent with the statutes under which PETITIONER was convicted and his Fifth and Sixth Amendments. Accordingly, the Petition for Writ of Certiorari should be granted.

DATED this 13 day of July, 1990.

MacPHERSON & McCARVILLE, P.A.

By _____

Donald W. MacPherson*
Kirk A. McCarville
3404 W. Cheryl Drive, #A-250
Phoenix, AZ 85051
(602) 866-9566
Attorneys for PETITIONER

*counsel of record

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Petition for Writ of Certiorari and the Appedix thereto has been mailed, postage pre-paid in the United States mail, this 14th day of July, 1990, to:

Solicitor General
Department of Justice
10th & Constitution Avenues
Washington, DC 20530

Mark Pickrell (by permission)
Donald W. MacPherson
MacPHERSON & McCARVILLE
3404 W. Cheryl Drive
Suite A250
Phoenix, AZ 85051